ConAgra, Inc. and/or ConAgra Grain Processing Companies, Inc., and Molinos de Puerto Rico, Inc. *and* Congreso de Uniones Industriales de Puerto Rico. Cases 24–CA–6856 and 24–CA–6881

August 20, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On June 13, 1995, Administrative Law Judge Arline Pacht issued the attached decision. The Respondents filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

1. The judge found that the Respondents violated Section 8(a)(5) and (1) of the Act by failing to provide requested financial information from the Union during contract negotiations. The dissent disagrees with the judge's determination that the facts in this case fall closer to *Shell Co*., 313 NLRB 133 (1993), than *Nielsen Lithographing Co*., 305 NLRB 697 (1991), enfd. sub nom. *Graphic Communications Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992). We agree with the judge for the reasons stated in her decision. In doing so, we note that under applicable precedent a determination that an employer is claiming that it cannot, as opposed to will not, pay a union's proposed wage demand is not dependent on the words used but rather on the substance of the employer's assertions. In this regard, the precedent clearly rejects the notion that claims of economic hardship or business loss can never amount to a claimed inability to pay what the union is proposing. Thus, regardless of the words used, if an employer's claims can be interpreted either as a present inability to pay or a prospective inability to pay during the contract term, it is obligated to provide the union with data supporting its assertions.

Further, we agree with the judge's determination that the Respondents' repeated representations, set forth in detail in the judge's decision, although carefully couched in terms of competitive disadvantage, amounted to claims that it could not presently pay and stay in business during the term of the agreement, thus giving rise to its obligation to provide the Union with supporting information. In this regard, we particularly note, among other things, the statements of Respondent Molinos' representative, Espinosa, at a negotiating session that he had seen the Company decline over the last 4 years, ''the situation is serious and fragile,'' ''if we are not competitive we cannot survive,'' and ''we must do something to be able to survive;'' and its general manager's statement at the same session that if immediate measures were not taken the probabilities were that Molinos would not be here in the future. We also note Espinosa's statement at another session, while discussing the Respondents' proposal to cease supplying soap to employees, that ''things like this are what makes us not be competitive and can make us have to close shop because we cannot compete.''[4]

Insofar as our dissenting colleague views the facts as showing that the Respondents were asserting simply a competitive disadvantage, we disagree. Alternatively,

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. The Respondents also assert in effect that some of the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that such contentions are without merit. Additionally, the Respondents have requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[2] We disavow the following comments by the judge which do not affect our decision: that there is a hint in the record that the bomb threat was initiated by management, and that the Respondents' Contingency Plan evidenced its goal of being able to terminate employees at will without having to account to the Union.

We further correct the following factual errors, which do not affect our decision. At the October 26, 1993 negotiating session, the Union asked Respondent ConAgra's vice president, Godbout, for sales figures, and not Respondent Molinos' general manager, Lange. At that same session, the Respondents did not restate directly their prior statement that Molinos would be measured against a different standard than previously, but did compare Molinos with other ConAgra companies in the grain processing division. Nor did Godbout directly state that the number of Molinos' employees would be reduced by 25 to 35 percent. Rather Godbout stated that comparable ConAgra operations in the States operated with that percentage fewer employees and that the number of employees would have to be reduced in order for Molinos to compete. Finally, there is a discrepancy in the record whether, at the first bargaining session, the Respondents' chief negotiator, Espinosa, stated that these negotiations would be ''difficult'' or ''different,'' but this discrepancy is irrelevant to the outcome here.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). The judge inadvertently omitted the removal language from his recommended Order. We shall therefore modify the Order to include a provision for the removal of discharge information.

[4] In adopting the judge's conclusion that the Respondents unlawfully refused to provide the Union with relevant financial information, we agree that the Respondents in effect were claiming a present inability to pay. However, we do not agree with the inference drawn by the judge that ambiguous words, without a time frame, should be construed against an employer as a present inability to pay.

to the extent the dissent may be read to conclude that any claimed competitive disadvantage may permissibly be accompanied by statements that an employer cannot pay and stay in business without amounting to an asserted inability to pay, we believe this approach blurs the meaningful distinctions between competitive disadvantage and inability to pay set forth in the established case precedent summarized above and discussed in detail by the judge.

2. The judge also found that the Respondents engaged in surface bargaining in violation of Section 8(a)(5) and (1). Our dissenting colleague disagrees, stating that the judge in so finding ignored governing legal principles. Contrary to the dissent, we view the judge's decision as consistent with established principles.

The dissent faults the judge for using various descriptions of the Respondents' bargaining proposals, claiming that this evidences the judge's departure from precedent. However, we find it clear that, although the judge at various times does describe the Respondents' bargaining position as ''harsh,'' ''onerous,'' and ''regressive,'' it is not on the basis of these characterizations that the judge concluded that the Respondents acted unlawfully. Instead, the judge carefully analyzed the distinctions drawn in the case law between hard and unlawful bargaining, which she recognized are often difficult to draw, to properly conclude that the totality of the Respondents' conduct evidenced a true intent not to reach agreement.

In arriving at this conclusion, the judge looked not only to the predictably unacceptable proposals proffered by the Respondents, which, contrary to the dissent, she found were not ameliorated by the few compromises made by the Respondents during bargaining, but also at their failure to provide supporting data for their repeated representations that Respondent Molinos could not pay more than what they proposed during the contract term and stay in business. The judge further considered the Respondents' conduct away from the bargaining table, coupled with the strategy set forth in their Contingency Plan, to conclude that the Respondents entered into negotiations with a predetermined strategy not to reach agreement. Specifically, the judge emphasized the considerable parallels between the Respondents' plan, arrived at before bargaining even began, and their entire course of conduct during negotiations. She noted that the preparations for implementation of the terms of their final proposal preceded the presentation of the final proposal to the Union and actions taken in anticipation of a strike began months before the Respondents knew the results of bargaining. Thus, the judge determined that the Respondents' true purpose was not, as the dissent claims, simply to gain economic concessions, with prudent advance planning in the likely event the Union did not agree. Rather, the judge concluded, and we agree, that the totality of the conduct demonstrates a real intent to avoid bargaining and cause a strike, enabling Molinos to employ permanent replacements under greatly reduced terms and conditions of employment.

Finally, the dissent condemns making moral judgment a basis for legal conclusions, implying that it is on that basis that we agree with the judge's finding that the Respondents' conduct was unlawful. That implication is wholly unjustified. Although the distinctions between hard and unlawful bargaining are elusive and sometime difficult to make, we agree with the judge that under the particular facts here the Respondents' conduct clearly crossed the line. We view the dissent's endorsement of the Respondents' bargaining strategy here as simply prudent planning to be tantamount to an abandonment of the principles set forth in established precedent finding unlawful negotiations with predictably unacceptable proposals and predetermined strategies designed to thwart the bargaining process.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondents, ConAgra, Inc. and/or ConAgra Grain Processing Companies, Inc., and Molinos de Puerto Rico, Inc., joint employers, San Juan, Puerto Rico, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All of the employer's production and maintenance employees in its Guaynabo, Puerto Rico mills, to include dispatchers, receiving clerks, parts clerks, elevator weight takers, warehouse employees and temporary or casual employees who during the period of January 1, 1972 to June 30, 1972, worked for 120 or more hours per month for at least 5 months during said period and . . . continued on as temporary or casual employees during the . . . eligibility period and as of the date of the election, but excluding all office employees, sales personnel, guards and supervisors as defined by the Act and every temporary or casual employee who is not within the formula specified in the inclusions.

(b) Failing or refusing to promptly provide the Union with all requested information necessary and relevant to collective bargaining, including, but not limited to the following information (a) for Molinos de Puerto Rico (MPR): audited financial statements for the past 5 years; materials reflecting future sales con-

tracts and those of the past 3 years; data comparing MPR's wages and benefits with those of competing mills in Puerto Rico; payroll records of workers currently working at MPR; and (b) for all other plants which comprise the ConAgra Grain Processing Companies: collective-bargaining agreements to which the respective plants are party; data pertaining to profit margins and operational costs; records showing ConAgra Companies' market share compared with the market shares of their competitors; wages and benefits for all hourly employees; and collective-bargaining agreements for the past 10 years to which ConAgra Grain Processing Companies are party.

(c) Unilaterally changing any term of condition of employment of unit employees, including, but not limited to the cancellation of health insurance, without first giving the Union notice of the proposed change and an adequate opportunity to bargain in good faith to agreement or impasse concerning such changes.

(d) Eliminating or failing to maintain and abide by the collective-bargaining agreement with the Union.

(e) Discriminating against employees by locking them out to further their unlawful bargaining conduct, and frustrate agreement, thereby depriving the employees of their bargaining rights.

(f) Conditioning the provision of information on the Union's withdrawal of charges before the National Labor Relations Board.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, meet and bargain in good faith with the Union as the designated exclusive collective-bargaining representative of the Respondents' employees in the unit described above in paragraph 1(a) of this Order.

(b) Restore all working conditions to those which obtained prior to October 28, 1993, and maintain them until the parties bargain in good faith to an agreement or impasse concerning any proposed changes.

(c) On request, promptly provide the Union with all requested information necessary and relevant for collective bargaining, including, but not limited to all documents within the categories identified in paragraph 1(b) of this Order.

(d) Within 14 days from the date of this Order, offer each employee on Respondent Molinos' payroll as of October 27, 1993, full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent positions, in accordance with all terms and conditions of employment in effect on October 27, 1993, without prejudice to their seniority or any other rights or privileges previously enjoyed, displacing, if necessary, any newly hired or reassigned workers.

(e) Make whole all employees on Respondent Molinos' payroll as of October 27, 1993, for any loss of pay and other employment benefits suffered from the date they were locked out on November 1, 1993, until such time as they are reinstated or reject reinstatement in a timely manner to be calculated as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), in the manner set forth in the remedy section of the judge's decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facilities in Puerto Rico, copies of the attached notice marked ''Appendix,''[5] in Spanish and English. Copies of the notice, on forms provided by the Regional Director for Region 24, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 2, 1993.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

MEMBER COHEN, dissenting in part.

I do not agree that the Respondents engaged in bad-faith bargaining. I believe that the judge and my colleagues have confused hard bargaining with bad-faith

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

bargaining. There is a legal difference between the two. I therefore dissent.

Section 8(d) commands good-faith bargaining, but it goes on to say that this obligation ''does not compel either party to agree to a proposal or require the making of a concession.'' In addition, the National Labor Relations Board must avoid making subjective judgments about the substance of proposals.[1] More specifically, the Board will not ''decide that particular proposals are either 'acceptable' or 'unacceptable' to a party.''[2] Similarly, the fact that a proposal is ''regressive'' does not establish that it is made in bad faith.[3] There is nothing in economics or in law which suggests that employment terms must always improve or even stay the same.

The judge in this case, affirmed by my colleagues, has ignored these principles. She condemned Respondents' proposals as ''unacceptable.'' She further set forth her view that they were ''onerous'' and ''harsh.'' Finally, she noted that they were ''regressive.'' As noted above, these are the very characterizations which the Board must eschew.[4]

Nor is the judge's opinion salvaged by her assertion that the proposals were ''predictably'' unacceptable. Concededly, if an employer makes a proposal with the purpose of having it rejected, so that an agreement will be avoided, such conduct would be inconsistent with the obligation to bargain in good faith. However, if the employer makes a proposal for a legitimate purpose (i.e., to cut labor costs), that proposal is not made unlawful by the fact that the employer predicts that the union will not agree to it.

In the instant case, the evidence does not establish an unlawful purpose. The evidence establishes only that the Respondents predicted (accurately) that the Union would not accept the proposal. The Respondents' plan stated:

> The Union will most likely not accept the changes proposed by the Company and will do its utmost to try to maintain the agreement as is and/or further limit management's operational flexibility.

By the same token, the Respondents predicted that the Union would support theirs bargaining position with a strike. The Respondents accordingly made plans for hiring replacements, and took security precautions. Given the Respondents' lawful prediction of a strike, it was simply prudent, and not unlawful, to prepare for such a strike.

Further, although the Respondents continued to insist on an $11-per-hour wage and benefit package, it did show flexibility in the area of wages and benefits. It offered a $6000 bonus for each employee, a wage increase for 30 percent of the unit, and the inclusion of the employee's immediate family in the health plan. By contrast, the Union failed to propose anything below current wages and benefits.

Based on all of the above, I conclude that the General Counsel has not established bad-faith bargaining. The evidence establishes only that the Respondents bargained hard for lower labor costs. In short, the Respondents wanted an agreement, albeit on its terms, and was prepared to use economic strength to accomplish this goal. The Board is not permitted to make a moral judgment about these matters and have that judgment translate into a finding of illegality.[5]

I also disagree that the Respondents were obligated to supply financial information to the Union. The Respondents expressly stated, many times, that they was not claiming an inability to pay.

My colleagues rely on respondent statements that, absent concessions, a competitive disadvantage would drive the Respondents out of business. Concededly, a competitive disadvantage will ultimately drive any company out of business. The Respondents' statements were consistent with this economic truism. However, as *Nielsen Lithographing Co*., 305 NLRB 697 (1991), enfd. sub nom. *Graphic Communications Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992), makes clear, those statements do not give rise to a duty to disclose financial information. The test is whether the company's position is that, absent concessions, it would be driven out of business during the life of the contract being negotiated. See *Nielsen*, supra at 699–701. There is no evidence or finding that the Respondents took that position.

In sum, the bargaining was not in bad faith, and information was not unlawfully withheld. It follows that the lockout was lawful and the postimpasse changes were lawful as well. I would therefore dismiss the complaint in these respects.[6]

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[1] *Reichhold Chemicals*, 288 NLRB 69 (1988).

[2] Id.

[3] *I. Bahcall Industries*, 287 NLRB 1257 (1988), review denied sub nom. *Teamsters Local 75 v. NLRB*, 866 F.2d 1537 (D.C. Cir. 1989); *Challenge-Cook Bros*., 288 NLRB 387 (1988); *Hamady Bros. Food Markets*, 275 NLRB 1335 (1985); *Rescar, Inc.*, 274 NLRB 1 (1985).

[4] My colleagues seek to discount the judge's use of these terms. However, in the judge's *concluding paragraph* on this issue, she stresses once again the ''unacceptable'' nature of the proposals, their ''severity'' and their regressive character.

[5] Contrary to the comment of my colleagues, I do not ''endorse'' the Respondents' bargaining. I simply find that the General Counsel has not established that the bargaining violated the Act.

[6] I agree that the Respondents, on February 3, unlawfully took the position that certain information would not be supplied unless the Union's charges were withdrawn. However, that contention did not taint the bargaining, the impasse, or the lockout. One week later, the Respondents explained that it meant only that they assumed that the charges would be withdrawn once the information was supplied.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to meet and bargain in good faith with Congreso de Uniones Industriales de Puerto Rico as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All of the employer's production and maintenance employees in our Guaynabo, Puerto Rico mills, to include dispatchers, receiving clerks, parts clerks, elevator weight takers, warehouse employees and temporary or casual employees who during the period of January 1, 1972 to June 30, 1972, worked for 120 or more hours per month for at least 5 months during said period and . . . continued on as temporary or casual employees during the . . . eligibility period and as of the date of the election, but excluding all office employees, sales personnel, guards and supervisors as defined by the Act and every temporary or casual employee who is not within the formula specified in the inclusions.

WE WILL NOT fail or refuse to promptly provide the Union with all requested information necessary and relevant to collective bargaining, including, but not limited to the information outlined below.

WE WILL NOT unilaterally change any term or condition of employment of unit employees, including, but not limited to changes in employee health insurance, without first giving the Union prior notice of the proposed change and an adequate opportunity to bargain to agreement or good-faith impasse concerning such proposed change.

WE WILL NOT eliminate or fail to maintain and abide by the terms of our collective-bargaining agreement with the Union.

WE WILL NOT discriminate against employees by locking them out to further our unlawful bargaining conduct which was intended to frustrate their bargaining rights and prevent agreement.

WE WILL NOT condition the release of information on the Union's withdrawal of unfair labor practice charges filed with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, meet and bargain in good faith with the Union as the designated bargaining representative of unit employees at Molinos de Puerto Rico regarding their wages, hours, and other terms and conditions of employment.

WE WILL restore and maintain all working conditions which were obtained as of October 27, 1993, until the parties bargain in good faith to agreement or impasse concerning any proposed changes.

WE WILL, on request, promptly provide the Union with all requested information necessary and relevant to collective bargaining, including, but not limited to the following information for Molinos de Puerto Rico: audited financial statements for the past 5 years; materials reflecting future sales contracts and those of the past 3 years; data comparing Molinos de Puerto Rico (MPR)'s wages and benefits with those of competing mills in Puerto Rico; payroll records of workers currently working at MPR; and for all other plants which comprise the ConAgra Grain Processing Companies: collective-bargaining agreements to which the respective plants are party; data pertaining to profit margins and operational costs; records showing ConAgra Companies' market share compared with the market share of their competitors; wages and benefits for all hourly employees; and collective-bargaining agreements for the past 10 years to which ConAgra Grain Processing Companies are party.

WE WILL, within 14 days from the date of the Board's Order, offer each employee on the Molinos' payroll as of October 27, 1993, full and immediate reinstatement to their former positions in accordance with the terms and conditions of employment in effect on October 27, 1993, or if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, displacing if necessary, any newly hired or reassigned workers.

WE WILL make whole all employees employed by Molinos de Puerto Rico as of October 27, 1993, for any loss of pay or other employment benefits they may have suffered as a result of our locking them out since November 1, 1993, and unilaterally changing their terms and conditions of employment, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of the employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

> CONAGRA, INC., CONAGRA GRAIN PROCESSING COMPANIES, INC., AND MOLINOS DE PUERTO RICO, INC.

Antonio F. Santos, Esq., for the General Counsel.
Angel Munoz-Noya, Esq. (Lespier & Munoz-Noya) and *Roger J. Miller, Esq. (McGrath, North, Mullin & Kratz)*, of Omaha, Nebraska, for the Respondents.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. On charges filed by Congreso de Uniones Industriales de Puerto Rico (the Union), an amended consolidated complaint issued on March 25, 1994.[1] The complaint alleges that the above-captioned Respondents violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act).[2] The Respondents are accused, inter alia, of failing to bargain in good faith by refusing to provide the Union with requested information, presenting regressive and predictably unacceptable proposals, unilaterally implementing a final offer before impasse was reached, unlawfully laying off 40 employees, or alternatively, failing to grant them severance pay, and imposing a lockout to compel acceptance of their bargaining proposals. The Respondents filed timely answers denying that they committed any unfair labor practices.

This case was tried in Hato Rey, Puerto Rico, from May 9 through 13, 1994, at which time the parties were afforded full opportunity to examine and cross-examine witnesses and to introduce relevant documents.[3] On June 10, 1994, the Board filed a petition for injunction under Section 10(j) of the Act in the U.S. District Court for the District of Puerto Rico. The Honorable Daniel Dominguez issued an opinion and order on February 10, 1995, granting injunctive relief pending the Board's final disposition of the case.[4]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondents, I make the following[5]

[1] The charge in Case 24–CA–6856 was filed on December 2, 1993, and amended on December 27, 1993, January 3 and March 25, 1994. The charge in Case 24–CA–6881 was filed on February 8 and amended on March 25, 1994.

[2] ConAgra, Inc. and/or ConAgra Grain Processing Companies, Inc. (ConAgra), and Molinos de Puerto Rico, Inc. (MPR, and collectively, the Respondents) are alleged to be joint employers.

[3] Documents submitted into evidence by the counsel for the General Counsel (the General Counsel) and the Respondents will be cited as General Counsel's Exhibit (G.C. Exh.) and Respondent's Exhibit (R. Exh.), respectively, followed by the appropriate exhibit number. Jointly submitted exhibits will be referred to as Joint Exhibits (Jt. Exh.), and references to the transcript will be cited as (Tr.) followed by the appropriate page number.

[4] The court ordered, inter alia, that the Respondents reinstate the unit employees under the terms and conditions of employment that were in effect prior to October 28; on request, provide the Union with the requested information necessary for collective bargaining, and bargain in good faith with the Union until agreement or impasse is reached. The Respondents filed an appeal which is pending before the Court of Appeals for the First Circuit.

[5] On September 29, 1994, the Respondents filed a Motion Requesting Permission to file Instanter Employer's Reply Brief in order to respond to three matters allegedly raised for the first time in the General Counsel's posttrial brief. On October 7, the General Counsel submitted a motion to strike the Respondents' reply brief. The Respondents' motion is denied for the following reasons: although an administrative law judge has discretion to grant such a motion, they generally are not encouraged unless prejudice would result by such denial. Nothing in the present case suggests that the Respondents will be prejudiced if their motion to file a supplementary brief is not granted, particularly since the matters which the Respondents wish to pursue are not novel and could have been addressed in their posttrial brief.

[6] Unless otherwise specified, all events occurred in 1993.

FINDINGS OF FACT

I. JURISDICTION

(a) At all material times, Respondent Molinos de Puerto Rico, Inc. (MPR), a Nebraska corporation with an office and place of business in Guayanabo, Puerto Rico, has been engaged in the manufacture, sale, and distribution of wheat and corn flour, animal feed, grains, and related products.

(b) At all material times, Respondent ConAgra, a Delaware corporation with an office and place of business in Omaha, Nebraska, has been engaged in the manufacture, sale, and distribution of wheat and corn flour, animal feed, grains, and related products.

(c) During the past 12-month period, Respondents MPR and ConAgra, in conducting their business operations described above in paragraphs 1(a) and (b) respectively, each received at their plants, grains, animal feed, and other goods and materials valued in excess of $50,000 directly from points outside the Commonwealth of Puerto Rico in the case of Respondent MPR, and the State of Nebraska with respect to Respondent ConAgra.

(d) The consolidated complaint alleges, and I find, that the Respondents have engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(e) At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

ConAgra, a multinational corporation headquartered in Omaha, Nebraska, has facilities in the U.S, Canada, and Europe. Its wholly-owned subsidiary, MPR, one of 60 plants in the ConAgra Grain Processing Company, consists of a corporate office and 3 other production facilities in Puerto Rico. The principal plant, located in Catano in the greater San Juan area, mills, sells, and distributes wheat and corn flour as well as animal feed. Two satellite facilities in Las Piedras and Hatillo mill only animal feed.

MPR and the Union have had a collective-bargaining relationship for 20 years, and throughout that time, executed eight labor contracts without incurring a strike or lockout. However, at the parties' first bargaining session held at the Respondents' request on June 16, 1993, MPR's director of human resources, Fernando L. Espinosa (Espinosa), stated prophetically: ''These negotiations are going to be different.'' (Jt. Exh. 74 at 2.)[6] On October 27, the eve of the contract's expiration, Espinosa's prophecy came to pass when the Respondents declared that the parties were at impasse.

The Respondents' bargaining team included Espinosa, who served as management's spokesperson throughout most of the negotiations, Chief Engineer Felix Matos, and Human Resources Manager Elba Delgado. Fred Lange (Lange), MPR's general manager since 1992, and Raymond E. Godbout (Godbout), vice president of human resources for ConAgra Grain Processing Companies, also attended several meetings. Arturo Figueroa (Figueroa), the Union's chief ne-

gotiator for the bargaining unit, was assisted by a number of employees.[7]

B. *The 1993 Negotiations*

1. Bargaining begins

The parties opened the 1993 round of contract negotiations by resolving some housekeeping matters, including setting a schedule for future meetings and agreeing that noneconomic issues would be addressed first, followed by bargaining over the economic proposals. Espinosa then asked if the parties could turn to economic issues should they reach impasse on the noneconomic items. Figueroa blithely replied, ''Kid, don't mention impasse before we begin.'' overshadowing things to come, Espinosa remarked: ''These negotiations are going to be different.'' The parties also agreed that Human Resources Manager Delgado would take notes which would be transcribed and submitted to the Union at the following session for correction and/or approval. The parties stipulated that although the notes were not verbatim, they accurately reflected the parties' positions, and offered them into evidence as Joint Exhibits 74–94.

Following these preliminaries, General Manager Lange used the balance of this first meeting to describe MPR's current financial situation. He explained that the corporation had been restructured so that MPR was now 1 of 60 companies within the new division, the ConAgra Grain Processing Company. He added that henceforth, MPR's performance would be compared with the other companies in the grain processing division rather than with competitive, unrelated companies on the island.

Lange then delivered an oral and visual presentation describing MPR's economic situation. He began by comparing MPR's labor costs with those of its island competitors. Referring to graphs and charts projected onto a screen, Lange advised the union negotiators that MPR was experiencing a decrease in sales volume, that its market share declined significantly from 72 percent in 1992 to 60 percent at the then-present time, and recently lost its largest customer. Although he admittedly had not compared economic factors which might account for this situation other than labor costs, Lange attributed this decline solely to the fact that MPR employees received wages and benefits which were higher than those paid to its Island competitors, who, he alleged, could sell their product at prices below those of the Respondents.[8] He then displayed a series of tables which graphically depicted that MPR's bargaining unit employees received on the average, higher wages and benefits than did its Puerto Rican competitors. With respect to wages alone, Lange pointed out that the average hourly rate for MPR employees was $8.45 while its closest competitor, Harinas, the only other facility in Puerto Rico to mill flour, paid its employees an average of $7.73. Taking wages and benefits together, MPR employees earned a total weighted average of $17.84 per hour, compared to $13.76 received by Harinas employees.

Lange next advised the union negotiators that the parent corporation, ConAgra, was demanding that the mill become competitive and improve its profit margin. He disclosed that the Respondents were considering importing premilled flour into Puerto Rico; therefore, if MPR was to survive, the Respondents would have to restore the mill's competitive edge by seeking ''givebacks'' in the new contract. To emphasize his grim message, Lange repeated that the Union would have to agree to substantial concessions if MPR was to compete; that the Company had insisted on immediate measures or MPR might not be there in the future.[9] Lange allowed that he had not examined any other aspect of the MPR operation which might explain its loss of market share from 1992 to the first 6 months of 1993.

Lange then addressed the potentially negative impact of the North American Free Trade Act (NAFTA) on MPR and some proposed amendments to the income tax code. He concluded by repeating the warning that MPR could not remain in business if it was not competitive, and that businesses that are not competitive do not survive.

At the end of the meeting, Espinosa gave the union negotiators copies of the Respondents' written proposal which set forth numerous demands for stringent concessions. Among the most regressive measures were those which involved a rollback of the unit employees' wage and benefit package to a weighted average of $11.11. This figure represented an average hourly reduction of $6.75 below the employees' current earnings and benefits. The $11 figure also was lower than the $13.76 total wage package rate paid by its closest competitor, Haranis, the only other facility in Puerto Rico to compete with MPR in the flour milling market. Lange testified that flour milling constituted approximately 50 percent of the business.

2. Bargaining over noneconomic proposals

At the parties' next meeting on June 22, Figueroa vehemently accused the Respondents of engaging in bad-faith bargaining by preparing a proposal which demanded radical concessions in virtually every economic term of the contract. The Union then distributed its written proposal which called for an increase in the employees' wage and benefits package from $17.84 to $20 per hour.

Espinosa conceded that the Company's proposal was ''radical,'' but insisted that MPR had to become more competitive; ''otherwise we disappear.'' Describing the situation as ''serious . . . and fragile,'' he continued:

> If you do not fill expectations since you are a very, very small part of ConAgra's operations, why should ConAgra care about the operation. If it does not matter to the membership that a lock be placed on it . . . . We are trying to make the organization competitive and that can survive with that competition that operates with a lot less employees and low operational costs.

For the rest of this session and throughout the summer, the parties bargained over noneconomic proposals. At a meeting on August 24, while discussing the Respondents' proposal to

[7] Figueroa founded and presided over the Union for years. Following his resignation from office in 1992, he was succeeded by his son.

[8] No evidence was presented regarding any price differentials between Molinos' products and those of its competitors.

[9] During the trial in this matter, MPR's general manager admitted that ''sixty percent of the flour market . . . is an enviable position to have.'' Tr. at 545.

cease supplying soap to the employees, Espinosa evoked laughter from the union negotiators when he said, apparently seriously, that ''things like this are what makes us not be competitive and can make us have to close shop because we cannot compete.'' While the laughter was directed to the ludicrous image of closing the mill because of the cost of a bar of soap, the Respondents' reference to ''clos[ing] the shop because we cannot compete'' was no laughing matter.

Although they were making progress, by August 31, 49 sections in 12 noneconomic articles remained unresolved. At this point, the Union announced it would not modify its position further on the disputed items and, at the Respondents' suggestion, agreed to shift to economic issues at the next meeting.

3. September 14—bargaining about economic proposals

At the parties' 11th meeting on September 14, Espinosa turned to the Respondents' economic proposals, reading aloud each of the 34 demands calling for stringent concessions.[10] Among the many measures, all of which were regressive, one provision created a two-tiered system under which new employees would be paid at rates lower than those proposed for current employees; while others decreased hourly wages by 30 to 50 percent for employees who worked beyond their shifts; reduced the number of hours for which an employee would be paid if he reported to work but received no assignment; reduced the number of holidays from 14 to 10; cut the maximum number of vacations days from 25 to 15; eliminated family coverage under the medical plan and added a 20-percent copayment requirement; reduced life insurance coverage; omitted the pension plan; eliminated an annual gift of a Thanksgiving turkey; cut the number of allowable sickdays almost in half; reduced the Christmas bonus from 8 to 2 percent, the minimum required by law; abolished bonuses for work performed on holidays, and for good safety and attendance records; deleted a $650 funeral allowance for close family members, as well as a sum to compensate for the difference between an employee's regular wage and the amount received for jury duty.[11]

Figueroa rejected each demand, insisting that bargaining had to be based on the Union's proposal. Espinosa again referred to the Respondents' need to be competitive and repeatedly asked the Union to suggest how they could reach a $10-per-hour figure. When the Union indicated that a decrease of such proportions was unthinkable, Espinosa repeated that management would consider union proposals only if they met the goal of improving the Respondents' competitive stance.

Turning to the Union's economic proposals, Espinosa asked rhetorically how MPR could become more competitive by raising wages, if it was not competitive at the current hourly rate. He persisted in asking Figueroa if the Union would meet the Respondents'requirements to reduce labor costs to $10 per hour. Equally persistent, the union agent argued that a $10- to $11-wage rate per hour was out of the question, that bargaining had to begin with the employees' current wage level.

Following this exchange, Figueroa posed the Union's first request for information, calling on MPR to produce its audited financial statements for the past 5 years, as well as its client list. Espinosa replied that proposals were based on the Respondents' interest in retaining a competitive lead in the market, not on a financial inability based on to pay. Nevertheless, he asked the Union to submit its request in writing with a statement of the reasons justifying its need for the information. When Figueroa asked repeatedly whether or not the Respondents were claiming an inability to pay, Espinosa answered that the ''issue'' was competitiveness in the market, not an inability to pay. By letter of September 20, Figueroa submitted a written request for MPR's audited financial statements and customer lists as the Respondents had insisted, but did not provide a written justification for the requests.

4. September 21—Respondents propose a few compromises

When the parties met a week later on September 21, the Respondents introduced a document titled, ''Last Position of the Company With Respect to Non-economic Matters As Of September 21, 1993,'' an integrated document which contained a few revisions, including a reduction in the contract's term from 5 to 4 years; adoption of the grievance and arbitration clause in the current contract; and a modification of a union proposal concerning temporary employees. Other than these few modifications, the Respondents' final proposal on noneconomic terms was comprised of the new provisions on which the parties had agreed, and the Company's original proposals where the parties had differed.

Espinosa then introduced an amendment to the Respondents' job classification proposal which added 2 new categories to the 3 initially proposed, supplanting the 55 categories in the current contract. In addition, the Respondents' amended proposal provided for an increase in the wage rate for the two additional job classifications; specifically, the rate for a semispecialized worker would be raised from $7.25 to $8 an hour and from $7.25 to $9 for employees in the specialized classification over the 4-year term of the contract. These two categories would affect approximately 30 percent of the then-current work force. The higher figures still were well below the previous wage rates for workers whose jobs fell within these categories.

The Respondents introduced another proposal—a one-time bonus of $6000 to be paid to each employee in equal installments over a 6-month period. Figueroa rejected both this and the job classification proposal, but stated that the Union would submit a counteroffer at the next meeting.

During this session, Figueroa gave Espinosa a letter setting forth the Union's request for financial statements. In a reply dated September 27, the Company stated that they were not claiming an inability to pay and insisted that the Union explain its need for the information and enter into a confidentiality agreement.

The September 28 meeting began on a rancorous note with Figueroa accusing the Respondents of conspiring long in advance to bargain in bad faith and taking actions which were intended to provoke a strike. To support his accusation, he

[10] The minutes of the bargaining meetings, J. Exhs. 74–95, are marked consecutively even though some of the meetings within that sequence were cancelled. Consequently, the parties' joint exhibits bear numbers that do not accord with the actual number of times they met. For example, a meeting on September 14 is marked Jt. Exh. 15, but actually was the parties' 11th bargaining session.

[11] On November 30, the Respondents notified the mediator that they inadvertently omitted the pension plan.

alleged that the Respondents were bringing armed nonemployee drivers into the facility, placing cameras around the plant, and subcontracting bargaining unit work to illegal aliens from the Dominican Republic. He further assailed the Respondents for prematurely presenting their final offer on noneconomic matters the week before, which, he alleged, demonstrated that they had little interest in attaining an agreement. He declared that the Union did not want a strike, but the Respondents were forcing them in that direction.

Espinosa denied that the Respondents were attempting to incite a strike, suggested that some truckers may have carried weapons because of a labor dispute at another plant, and claimed that to the Company's knowledge, the subcontractors hired only legal aliens. The Union then presented a counteroffer to the Respondents and the meeting concluded soon thereafter.

At the next meeting on October 5, the Respondents rejected the Union's latest proposal, stating that it failed to address their need to enhance MPR's competitive posture. The Respondents then offered to amend their health insurance proposal by adding family coverage but added a new 20-percent copayment.

Before rejecting this latest proposal, Figueroa announced that unless the Respondents retreated on their demands for extensive economic concessions, the Union would issue letters to MPR's competitors warning them of union action if they complied with the Respondents' requests to supply grain during a strike. Espinosa flatly denied that MPR was striking deals with its competitors.[12]

Agreeing that they were far apart, Figueroa again insisted that bargaining had to be based on the employees' current wage package. Espinosa then suggested seeking a mediator's services, but Figueroa objected that the parties were too far apart for such intervention to be useful.

The Union then renewed its request for the Company's audited financial statements. Espinosa responded that the request was under consideration but the Company was waiting for the Union to explain in writing why it needed the material. He again noted that Respondents were not relying on economic incapacity to justify their demand for concessions.

The parties made no progress at the October 12 meeting. To the contrary, Respondents appeared to be digging in their heels. For example, when Figueroa accused management of ordering drivers to cross a picket line in the event of a strike, Espinosa failed to issue a denial. Instead, he indicated that the Respondents had prepared and were following an action plan which equipped them to cope with any eventuality. The Respondents then rejected the Union's latest proposal, maintaining they would not relent on their demands for extensive concessions.

The Union came to the October 19 meeting armed with a new economic offer to trim the hourly wage increase to $3 per hour over the life of the contract. The Respondents promptly rejected the proposal stating that it did not come close to making MPR competitive. After Espinosa asked whether the Union was inalterably opposed to any proposal which substantially reduced salaries and benefits, Figueroa stated that the Union could answer that question after examining the materials it requested, including the financial statements, sales contracts, and earnings of all MPR nonunion personnel. While pointing out that the Respondents were not alleging an inability to pay, Espinosa stated that the Respondents were awaiting a written explanation of the Union's purposes and reasons for the requests. Further, Espinosa announced that the Respondents would not forward another counteroffer until the Union presented a proposal which substantially reduced labor costs.

Subsequently, the Union offered additional compromises including a reduced hourly wage, one less holiday, and several other reductions. The Respondents rejected this offer as well.

In an October 21 letter to Lange, Figueroa renewed the Union's request for MPR's audited financial statements for the past 5 years as well as current and projected client lists. Replying by letter dated October 25, Espinosa justified the Company's refusal to comply on two grounds; first, that the Respondents were not claiming an inability to pay, and therefore, were not obliged to forward the requested information. Second, he pointed out that the Union had failed to explain why they needed the information.

The parties met on October 26 for what would be their final session before the contract's expiration date. Lange repeated the refrain that MPR had to remain competitive; that management had noted a reduction in the volume of business and decreased sales, which he attributed to aggressive competition. At this, Figueroa immediately requested MPR's sales information for the past 3 years.

Raymond Godbout reappeared at this session, underscoring the importance the Respondents attached to improving MPR's competitive advantage. He conceded that MPR was losing money in the animal feed side of the business and its sales volume had diminished overall, but the mill continued to be profitable. He claimed that the Company's future was at risk because production costs, the highest among theier Puerto Rican competitors, could no longer be passed on to customers since this practice was responsible for reducing MPR's sales volume and market share. The issue, he asserted, was not ''whether presently we make a profit or whether we are going to make a profit in the future, nor how high are these profits going to be. Our issue is whether we can continue in the market producing or not.'' (Jt. Exh. 94 at 5.) He also announced that the number of employees would be reduced by 25 to 35 percent.

Referring to Godbout's remarks about declining sales, Figueroa asked whether he had compared MPR's present and projected contracts with those of its competitors to determine their relative impact on profits. Godbout acknowledged that he had compared only MPR's labor costs with those of its rivals, but insisted that these comparisons were valid without reference to other variables. Figueroa then renewed his request for all documentation pertaining to sales for the previous 3 years. On October 25, the Respondents sent a written rejection, stating that the Union had failed to supply the rationale for its requests, and since they were not averring an inability to pay, they had no duty to furnish the information.

Expressing dismay with the Union's failure to understand the Respondents' need to reduce labor costs, Godbout, nevertheless, promised to confer with management at corporate headquarters to see if any movement was possible. The meet-

[12] Record evidence indicates that the Respondents arranged to unload supplies at the docks of four of its competitors, but no proof was introduced establishing that the Respondents struck deals with them to purchase grain should a work stoppage occur.

ing concluded after Figueroa announced that if agreement was not reached the next day, the Union would ask the Conciliation and Arbitration Bureau or a federal mediator to intervene. The Union subsequently applied to the Bureau, but was advised by letter dated October 29 that the Respondents had rejected its services.

At the Respondents' request, the Union's negotiating team arrived at MPR's corporate offices at 6 p.m. on October 27. While waiting to meet with management officials, a maintenance employee warned them that a bomb threat had been received. They made a hasty exit, but returned to the building after the police failed to detect a bomb.

5. The Respondents' final offer

When the parties finally assembled on October 27, Espinosa presented a document to the Union titled ''last and final offer.'' The integrated contract included the final noneconomic terms the Respondents presented on September 21, and the economic offer originally submitted to the Union on June 22, as modified by a limited wage-rate increase of approximately $1 per hour for the 4-year term of the agreement affecting a limited part of the work force, a medical plan expanded to include family coverage but with an added copayment feature, and a $6000 bonus per employee. The final offer did not include a pension plan, which was restored at the end of November, after its omission was brought to the Respondents' attention.

In a cover letter accompanying the final offer, the Respondents stated that since the parties had reached impasse, they would implement the final offer on Monday, November 1. The letter further advised that the facility would be closed until November 1 to give the employees an opportunity to consider the offer.

At approximately 9 p.m. on October 27, one of MPR's supervisors rushed into the mill to warn of a bomb threat and urged the workers to evacuate. As the employees attempted to leave, they were confined involuntarily for over an hour between two parallel locked fences which bordered the facility. While detained in this manner, private security guards arrived armed with guns and bats, and formed a phalanx in front of them. The employees eventually were released and told that the plant would be closed until November 1 to give them an opportunity to consider the Respondents' final offer. Any employee who had to reenter the facility that evening to gather his belongings, was escorted in and out by a plant guard.

The Union rejected the final offer, but at the same time, Figueroa implored the Respondents to withhold implementing it until the Union submitted further compromises for their consideration. He also urged the Respondents to continue bargaining on November 1. By return mail, Espinosa spurned Figueroa's plea, writing ''the time for negotiating is over.'' (Jt. Exh. 29.) The next day, October 29, the Union delivered still another written proposal to the Respondents, offering to retain benefits at the levels set in the expired contract, and to increase wages by no more than $2 or 50 cents an hour over a 4-year period. After taking this latest offer under advisement for almost a month, the Respondents rejected it on November 23, stating they were holding firm to the demands set forth in their final offer.

C. *The Lockout*

By letter of October 29, Espinosa advised Figueroa that on November 1, the Company would reduce the work force by discharging the 40 least senior employees. However, pursuant to the applicable provision in the final offer, severance pay would not be offered. In fact, no one received notice of discharge. Instead, the Respondents imposed a lockout.

When the unit employees reported for work on November 1, the Respondents greeted them with a memo stating that since the final offer was rejected and in light of recent incidents which posed risks to the safety of personnel and the security of the building, a lockout would be in effect until a collective-bargaining agreement was executed.

On November 1, MPR resumed production using ConAgra employees imported from the continental United States as prescribed in the Contingency Plan. Espinosa explained that the Respondents were able to continue operations unabated by reason of their careful preparations for a work stoppage as outlined in a detailed memorandum titled, ''Contingency Plan 1993.'' Developed before bargaining began and while the Respondents were preparing their initial contract proposals, the Contingency Plan carefully charted all the steps to be taken to keep the mill functioning during a work stoppage. Thus, in collaboration with corporate headquarters, MPR arranged to import ConAgra personnel from the U.S. before a work stoppage was initiated, so that no production time would be lost. According to an ''Implementation Timetable'' appended to the Contingency Plan, the first wave of 10 U.S. workers would land in Puerto Rico approximately 4 days before the contract expired; the balance would arrive on Saturday, October 30 and begin working on day one of the work stoppage—November 1—at wage rates higher than those in the expired collective-bargaining agreement.[13] Thereafter, the Respondents planned to hire local laborers, at wage rates lower than those in the final offer and excluding benefits. At the time of trial in this matter, the lockout still was in effect and the MPR work force consisted of temporary replacements.

D. *Negotiations After November 1*

Under the auspices of a mediator from the Puerto Rico Bureau of Conciliation and Arbitration, the parties met on November 23 and February 3 and 23, 1994, but failed to come any closer together. At the first postlockout meeting on November 23, each side met separately with the mediator, telling her, in essence, that they were committed to their previous positions. However, Godbout qualified his answer, telling the mediator that with each passing day, the Respondents were losing money which might cause them to revise their final offer. His statement flies in the face of a contrary statement in the Contingency Plan in which the Respondents predicted far vaster profits if they were able to hire temporary replacements than if they put the unit employees back to work. The Respondents also sent a message to the Union that

[13] The Contingency Plan's implementation timetable shows that 10 U.S. employees were scheduled to arrive in Puerto Rico on October 24, with the balance due on October 31. Lange testified that approximately 30 U.S. employees arrived on October 30, but did not expressly negate the arrival of other ConAgra employees earlier in the week.

they would terminate medical benefits at the end of the month.

During this meeting, the Union asked that the Respondents comply with its pending request for information which it need to analyze the final offer. Godbout told the mediator that the Respondents gave the Union all the information it required at the parties' first bargaining session.

When the Union requested another meeting in mid-December, Espinosa advised the mediator that the Respondents believed an impasse still existed and would not meet until the Union was ready to make significant concessions. Figueroa retorted that the only impasse was the fictitious one the Respondents had engineered from the outset. He also renewed the Union's requests for documentation, explaining that the material sought would assist the Union to evaluate the the Respondents' claims.

By letter of November 30, the Union renewed its past information requests, but asked for the financial reports for a 5-, rather than 3-year period. In addition, the Union listed a number of new items which, in large measure, pertained to the competitive posture of the other plants in the ConAgra Grain Processing group. For example, the Union requested data regarding the profit margins and operational costs of the other ConAgra companies in the division, studies comparing these companies with their competitors, all collective-bargaining agreements to which ConAgra Grain Processing was a party, and information about the pension plan and the payroll for current MPR employees.

The Respondents produced some and withheld some of the requested material. For instance, the Respondents refused anew to produce their financial reports or any material pertaining to other ConAgra subsidiaries. They did release some sales information, but no more than the four charts the Respondents displayed at the first bargaining session comparing MPR with other Puerto Rican mills. The Respondents also furnished a copy of the pension plan and a list of the number of temporary employees, their positions and wages, but withheld their names.

When the parties finally met on February 3, 1994, the Union announced it was prepared to modify its bargaining position significantly, but first wanted to know if the Respondents were ready to retreat from their final offer. Godbout replied that the Company was willing to consider other options as long as they significantly reduced labor costs. By this, Godbout meant a reduction below the current scale. Unable to procure an answer from the Respondents as to their readiness to recede from the terms of the final offer, the Union indicated that it was unwilling to accept proposals which reduced the employees' earnings below their present levels.

With respect to the Union's renewed information request, Godbout stated that although the Respondents were not obliged to comply, they would do so if the Union satisfied three conditions: (1) withdraw its charge filed with the NLRB alleging that the Respondents were wrongfully withholding financial data, (2) specify the materials it wanted, and (3) enter into a confidentiality agreement covering the material to be provided. (Jt. Exh. at 3.)

Following the February 3 meeting, the Union filed another charge accusing Godbout of conditioning the delivery of information on the withdrawal of a prior charge accusing the Respondents of wrongfully withholding information. At the next mediated session on February 23, Godbout backpedaled, claiming he had asked the Union to enter into a confidentiality agreement. If the Union agreed, the Respondents would furnish the requested documentation. He further explained that he made this proposal in order to settle the matter, assuming that the Union would withdraw the unfair labor practice charge as a matter of course once it received the requested information.

The balance of the February 23 meeting was consumed by an exchange between Godbout and Figueroa as to the relevance of the Union's requests for additional information concerning the performance of ConAgra industries in the United States. Godbout challenged Figueroa to tell him how information about mainland plants could be relevant since they do not compete against MPR. At this, Figueroa reminded him that at the first bargaining session, Lange announced that in accordance with a reorganization, MPR would be compared with 60 other mills within the newly organized ConAgra Grain Systems Company. Implying that Figueroa had misunderstood the thrust of Lange's remarks, Godbout attempted to explain that MPR's performance would be judged on the basis of the performance of the ConAgra Grain Processing Division, but insisted that the ''statement . . . has nothing to do with the competitive position of . . . MPR.'' (Jt. Exh. 97 at 13.)[14]

Analysis and Conclusionary Findings

I. THE ISSUES

The major issues to be resolved in this case are:

1. Whether the Respondents failed to bargain in good faith by: (a) refusing to furnish the Union with requested information; and (b) presenting predictably unacceptable proposals with an intent to frustrate agreement.

2. Whether the parties reached a genuine impasse on October 28.

3. Whether the Respondents unlawfully locked out their employees.

4. Whether the Respondents unlawfully implemented their final offer.

II. THE RESPONDENTS FAILED TO BARGAIN IN GOOD FAITH

A. *The Respondents Wrongfully Withheld Information*

1. Applicable precedents

The first question to be resolved in this case is whether the Respondents violated Section 8(a)(5) and (1) of the Act by failing to furnish requested information to the Union. An analysis of this issue starts with *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956), where the Supreme Court held that an employer's claims during bargaining that it is unable to pay a union's requested wage increase, may require it to furnish ''proof of . . . [the] accuracy of the claim.'' Refusal to sub-

[14] As recorded in Delgado's minutes of the June 17 meeting, Lange stated: ''Our company will now be measured in a different manner than what we were measured in the past. This is because the Grain Processing Company has more than sixty companies and they will be comparing us to them, not with results of the other companies in the Island.'' (Jt. Exh. 74 at 4.)

stantiate such claims ''may support a finding of a failure to bargain in good faith.'' Id. at 153.

However, adopting the approach taken by the Court of Appeals for the Seventh Circuit, the Board has held that where an employer's resistance to a union's request for information is not based on an inability to pay, but on an assertion of competitive disadvantage, the employer need not surrender corroborative information to the union. *Nielsen Lithographing Co.*, 305 NLRB 697, 699 (1991).[15] The distinction is between the employer who ''will not'' pay because of concerns about its financial status at an uncertain time in the future when it may be unable to compete, versus the employer who claims that its present economic condition makes it unlikely it will be able to pay during the life of the agreement under negotiation. Id. At 699–700, citing *NLRB v. Harvstone Mfg. Corp.*, 785 F.2d 570, 576–577 (7th Cir. 1968). In other words, an employer claiming that accepting the union's demands will imperil its competitive posture, still must release the information if the predicted adverse effects will occur during the term of the successor contract, rather than at some undefined future time. In determining whether an employer's claims are immediate or prospective, each case turns on its particular facts. Id.[16]

On applying the *Nielsen* test to the facts in *Shell Co.*, 313 NLRB 133 (1993), the Board reached a different conclusion. In *Shell*, unlike *Nielsen*, the employer expressly told the union negotiator that economic conditions had affected the company ''very badly, very seriously,'' that present circumstances at its airport operation were ''a matter of 'survival . . . that it was losing business, that it had lost an important customer, and that it faced serious regulatory and cost problems.'' Id. The Board concluded that:

> the Respondent's bargaining posture as a whole, as expressed to the Union, was grounded in assertions amounting to a claim that it could not afford the most recent contract at its Airport operation, that it was faced with a present threat to the operation's survival, and, therefore, it was at present unable to pay those terms in the successor contract. Id.

2. The precedents applied to this case

The relevant facts in the instant matter fall closer to *Shell* than *Nielsen*, thereby bringing it ''within the gravitational field of *Truitt*.''[17] It cannot be disputed that the Respondents repeatedly told the Union that their concessionary demands were necessary if they were to advance their competitive posture and denied that they were asserting an inability to pay. Yet, the Respondents' agents also alluded to the tenuousness of MPR's economic condition; that MPR's very survival was at risk. Close inspection of the record discloses that whenever the Union requested information to test the Respondents' claims, management invoked competitive advantage to justify withholding documents. However, when attempting to persuade the Union to accept their concessionary proposals as a matter of bargaining strategy, the Respondents stressed the fragility of the Company, warning that MPR's very survival was at risk. Recall that Lange stated, ''If we do not take immediate measures that (sic) are probabilities we will not be here in the future.'' (Jt. Exh. 74 at 4.) At the same meeting, Espinosa interjected: ''I have seen the Company's decline during the last four years . . . . [T]he situation is serious and fragile . . . if we are not competitive we cannot survive. . . . We must do something to be able to survive.'' (Jt. Exh. 75, pp. 3–4.)[18] Both men warned that ConAgra could ship milled flour directly to Puerto Rico, putting MPR out of business. References to financial problems continued throughout the negotiations. On more than one occasion, management told the Union that MPR was losing money in the animal feed portion of the business, and that the sales volume in flour fell after a major client defected. Some days prior to the contract's expiration, the Respondents told the Union that between 25 and 35 percent of the work force would be laid off. Then, on the day after the contract expired, management delivered the coup de grace, advising the Union that 40 employees would be permanently discharged on November 1. In short, the Respondents spoke out of both sides of their mouths.

In their brief, the Respondents contend that the Union should have known that their remarks about MPR's financial circumstances referred to some uncertain time in the distant future since they consistently maintained that concessions were critical, to restore MPR's competitive advantage, not because of an inability to pay.

The record supports the Respondents' contentions as far as they go; the problem is they did not go far enough. The Respondents did not confine themselves to a claim of competitive disadvantage; they also spoke of the mill's future in bleak terms, suggesting that the plant's survival was in jeopardy unless the Union agreed to extensive and immediate givebacks for the 4-year life of the contract. In light of their inherently contradictory statements, and while refusing to furnish documentary proof to support their contentions, I find little reason why the Union should be compelled to attach the same legal significance to claims of competitive disadvantage as the Respondents do. When management stated that ConAgra was considering shipping processed flour to Puerto Rico, thereby implying that MPR might be superfluous, the Union could not know with certainty whether the threatened closure of the mill was around the corner or in the next mil-

[15] Enfd. sub nom. *Graphic Communications Local 508 v. NLRB*, 977 F.2d 1168 (7th Cir. 1992).

[16] Based on the facts in *Nielsen* (Members Devaney, Raudabaugh, and Oviatt, concurring), Chairman Stephens dissented, noting that ''an employer may put its economic status into issue through a variety of statements along the economic spectrum . . . . [I]t does not require an express plea of poverty.'' Id. at 706 fn. 8. The Chairman concluded that since *Nielsen* ''directly placed its economic condition at issue . . . the Respondent was obligated to supply requested information that would allow the Union to assess the accuracy of those claims . . . and decide whether or not to grant those concessions.'' Id. At 708.

[17] Chairman Stephens also pointed out in his *Nielsen* dissent, that in remanding the case to the Board, the *Nielsen* court of appeals indicated ''that the facts of the instant case possibly 'place it halfway between *Truitt* and *Harvstone*' . . . thereby 'perhaps bringing the case within the gravitational field of *Truitt*.''' Id. at 708. *NLRB v. Harvstone Mfg. Corp.*, supra, was the seminal case in which the same circuit court determined that a claim of competitive disadvantage could not be equated with an inability to pay and thus, did not give rise to the same duty of disclosure.

[18] The Respondents' own records show that MPR's control of market share rose during 3 of the past 4 years. The only decline in the Respondents' market share occurred between 1992 and the first 6 months of 1993.

lennium. Since the Respondents are responsible for creating the ambiguity about MPR's fiscal soundness and ability to compete without drastic reductions in labor costs, they may not object when the Union seeks information to test the truth of these claims and determines whether the mill's future is at risk.

Moreover, the Union had good cause to wonder if MPR was experiencing hard times by virtue of the Respondents' insistence that their regressive final offer had to be implemented forthwith, as opposed to phasing in concessions over a period of time or proposing a reopener clause in response to Figueroa's comment that the Union should not be locked into a regressive contract for 4 years if MPR's financial condition improved. Apart from other considerations, the severity of the wage cuts alone could prompt the most trusting union to question whether their employer was disguising its inability to pay claim as competitive disadvantage with loss of market share.

In addition, the Union was aware of other facts which raised legitimate questions about MPR's economic viability. For example, the Union knew that the Respondents had abolished a third shift and laid off the employees on it the previous March. In October, the Respondents announced another downsizing which brought the dismissal of 40 employees.[19] Under these circumstances, the Union reasonably could question whether the mill's survival was at risk in the foreseeable future.

At no time did the Respondents assure the Union that their dire forecasts referred to some remote, far-distant time. They failed to provide any clues to the timeframe they had in mind when they said that the plant might not survive, or that its future was fragile. The charts projected on a screen at the first negotiating session, and the release of this material to the Union in December, did not begin to satisfy the Union's need for documentation which would give it a broader and deeper understanding of the Respondents' financial circumstances. Without appropriate documentation, the Respondents' purposely ambiguous and contradictory messages offered the Union no way to assess the true state of the mill's current and prospective fiscal posture. Consequently, in the context of this case, inability to pay and unwillingness to pay in order to achieve greater profits, or enlarge market share so that the mill might survive, suggest a distinction of questionable merit. The Respondents may not manipulate the law in this way, attributing the loss of market share to the employees' relatively high wage and benefit package, the Respondents refused to release information requested by the Union to assess the truth of their Employers' assertions. The Respondents' insistence on a broad array of drastic givebacks, to be implemented immediately and remain in place for the entire 4-year term of the contract, requires a far more detailed, candid a well-documented explanation than management officials were prepared to provide.[20] Surely, the words ''competitive disadvantage,'' cannot be tossed off as a talisman to exempt the Respondents from a duty to furnish probative material or offer sound reasons to substantiate their urgent need for a collective-bargaining agreement riddled with concessions.

The Union stated orally and in writing that it needed the material to evaluate the bona fides of the Respondents' demands and determine how best to address them. Certainly, the financial statements, sales contracts, and wage surveys underlying the charts which Lange displayed at the first bargaining session would be germane to the Union's need to know, given the liberal discovery standards which govern a party's duty to produce relevant information pursuant to a request. In view of MPR's ominous warnings of plant closure, shutdown of a third shift, and announcement of a mass layoff, the Union surely has a right to regard the Respondents' ''bargaining posture as a whole . . . grounded in assertions amounting to a claim'' that it had an inability to pay in order to support its demand for probative documents. *Shell Co*., supra; see also *Teleprompter Corp. v. NLRB*, 570 F.2d 4, 9 (1st Cir. 1977). As such, the Union's request for MPR's audited financial statements and sales contracts to determine how to best serve its constituency was altogether legitimate. Consequently, the Respondents were obliged to comply with the Union's request for audited financial statements and sales contracts.[21]

As detailed in the factual narrative above, on November 30, the Union posed additional requests for information regarding profit margins, operational costs, market share, collective-bargaining agreements, as well as salaries and benefits at the other companies in the Respondents' grain processing division.[22] With one exception, the Union had ample justification for its requests, reminding the Respondents that they put material pertaining to the facilities in the Grain Processing Company in issue when they announced at bargaining sessions on June 17 and October 26 that MPR ''will now be measured different from what we were measured in the past. This is because the Grain Processing Company has more than sixty companies and they will be comparing us to them, not with the results of the other companies on the island.'' The Union's request for salaries and benefits paid at the other ConAgra mills does not stand in the same posture as the other information requested unless the Union had in mind wages and benefits paid to hourly employees at other ConAgra mills.

[19] The Respondents also averred that it discharged one-third of its administrative staff in January 1994.

[20] The Respondents' reliance on a wage comparison is not, standing alone, sufficient to justify their demand for widesale concessions. Lange acknowledged that he had not taken into account the present and future contracts of its competitors, which might have had an enormous affect on sale volume and market share and shed light on whether the Respondents' apprehensions as to its ability to compete was well-grounded. Record evidence also shows that MPR sold its products abroad. However, the Respondents presented no evidence bearing on competition outside Puerto Rico.

[21] The Union is entitled to examine only those materials which are reasonably necessary to evaluate the Respondents' claims. *Teleprompter Corp. v. NLRB*, supra at 9. With this constraint in mind, the Union has failed to explain how another part of its first information request—MPR's client list—would aid it in assessing the Respondents' financial claims. Accordingly, the Respondents shall not be ordered to produce these lists.

[22] The Union's request could be regarded as a request for information pertaining to all ConAgra businesses. Since there is no evidence showing that information concerning ConAgra facillties other than those in the grain processing group would be relevant to MPR, I shall construe the Union's request as applying only to those plants included among the Grain Processing Companies.

3. The Respondents failed to show need for confidentiality agreement

The Respondents contend that they were prepared to deliver the material if the Union had complied with their request to execute a confidentiality agreement. When an employer demonstrates a compelling need for confidentiality which on balance, outweighs the union's need to inspect the material, otherwise relevant documents may be conditioned on the execution of a confidentiality agreement. *Good Life Beverage Co*., 312 NLRB 1060, 1061 (1993); *Minnesota Mining Mfg. Co*., 261 NLRB 27, 30 (1982), enfd. sub nom. *Oil Workers v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983).[23] The party claiming confidentiality bears the burden of proving that such an agreement is warranted. Id. The Respondents failed to meet that burden.

The record contains no evidence that the Respondents ever identified the information they considered confidential in the materials requested by the Union, nor did they offer any reason for their confidentiality concerns. Without explanation or a request to bargain, the Respondents simply posed a confidentiality condition in their September 27 letter to the Union. However, they apparently did not take this condition seriously, for when they rejected the Union's information request in a letter of October 25, they said not a word about such concerns. Thus, before declaring impasse, the Respondents failed to establish that they had ''legitimate and substantial confidentiality interests'' which outweighed the Union's need for the financial statements and sales contracts so that it might properly evaluate and respond to their regressive contract demands. Id.

Again, in a lengthy letter to Figueroa, dated December 29, the Respondents unequivocally rejected all of the Union's information requests which it outlined in its letter of November 30. Although the Respondents offered a rationale for declining to release each category of documents requested, they said not a word about alleged confidentiality concerns.

In fact, not until they submitted their posttrial brief did the Respondents attempt to link their demand for a confidentiality agreement to the Union's purported ''proclivity'' to disclose confidential information to MPR's competitors. The Respondents presumably were referring to letters the Union sent to some other mills warning that if they cooperated with MPR, they would be subject to lawful concerted activity. These letters did not disclose or pertain to confidential information obtained from the Respondents, or from any other source for that matter. Thus, the Respondents' reliance on *Good Life Beverage*, supra, is inapt for in that case, the union divulged private financial data plainly inimical to the employer's interests in a newspaper article. Here, the Respondents erred in alleging that the Union demonstrated a proclivity toward revealing confidential information, failing to provide any justification for withholding documents the Local needed to examine in order to assess and respond appropriately to highly regressive contract demands. It follows that the Respondents' refusal to relinquish the information constitutes a failure to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act.

[23] Under some circumstances, the requested information may be unconditionally withheld. See, e.g., *Detroit Edison v. NLRB*, 440 U.S. 301 (1979).

5. The Respondents unlawfully sought withdrawal of charge

As detailed above, the consolidated complaint alleges that the Respondents, through Godbout, wrongfully conditioned the release of requested information on the Union's withdrawing its charge alleging the unlawful withholding of such information. Godbout denied that he imposed such a condition, but if there was any doubt about what he said, he clarified his remarks at the next bargaining session a week later when he explained he simply assumed the Union would withdraw its charge once the unfair labor practice was settled. Based on Godbout's testimony, the Respondents moved to dismiss the allegation during the trial. For the following reasons, the Respondents' motion is denied.

Godbout's statement to the Union appears in the minutes of the February 3 bargaining session, as recorded by his own colleague.[24] These notes establish that nothing about Godbout's words were ambiguous; it taxes credulity to believe that his message represented a settlement offer as he subsequently alleged. Without a doubt, he made the delivery of information the quid pro quo for the Union's withdrawing its unfair labor practice charge. Little more needs to be said to support the conclusion that in conditioning the delivery of information to the Union on its withdrawing its unfair labor practice charge, the Respondents violated Section 8(a)(1) and (5) of the Act.

B. *The Respondents Engaged in Surface Bargaining*

1. Applicable principles

The duty to bargain in good faith required by Section 8(d) of the Act, urges both employers and labor organizations ''to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.'' (29 U.S.C. § 158.)

Since Section 8(d)'s enactment in 1947, the Board and the courts have wrestled with the meaning of good-faith bargaining, finding it easier to agree on general principles than to apply them. In charting the contours of this elusive concept, the Supreme Court stated in *NLRB v. Katz*, 369 U.S. 736, 747 (1962), that ''the Board is authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement. In other words, a party may not enter into and engage in negotiations with a predetermined resolve not to budge from an initial position.'' *NLRB v. Truitt Mfg. Co*., 351 U.S. 149, 154 (1956). Good-faith bargaining requires more than merely appearing at meetings and going through the motions, while harboring a take-it or leave-it attitude. To the contrary,

> it presupposes a desire to reach ultimate agreement. . . . It requires active participation in the deliberations so as to indicate a present intention to find a basis for agreement. Not only must the employer have

[24] Although the minutes are not verbatim, the parties stipulated that they accurately reflect the parties' statements.

> an open mind . . . but a sincere effort must be made to reach common ground.

NLRB v. Insurance Agents' Union, 361 U.S. 477, 485 (1960). The ultimate objective of good-faith bargaining is a signed agreement. *NLRB v. Truitt*, supra at 686. Consequently, ''if the Board is not to be blinded by empty talk and the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions'' an employer takes during negotiations. *NLRB v. Reed & Prince Mfg. Co*., 205 F.2d 131 (1st Cir. 1953).

At the same time, the Act does not compel agreement between employees and employers, nor does it require concessions if positions are fairly asserted. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 402 (1952). Moreover, bad faith may not be inferred solely from a party's failure to retreat from a position. However, intransigence, coupled with other evidence, may support a finding of an uncompromising attitude. See *NLRB v. Fitzgerald Mills Corp*., 313 F.2d 260 (2d Cir. 1963), cert. denied 375 U.S. 834 (1963).

The Board treads a thin line in assessing allegations of bad-faith bargaining. Ordinarily, a willingness to compromise is considered an important indicia of good-faith bargaining by the Board and the courts. At the same time, Section 8(d) explicitly commands that a party's failure to make concessions may not be condemned. While cases indicate that the Board is not at liberty to examine the substantive content of the parties' proposals, it is obliged to evaluate the totality of the parties' tactics and conduct at and away from the bargaining table in order to determine whether the parties have complied with their duty to bargain in good faith. In discharging this duty, the Board looks ''to whether the parties' conduct . . . evidences a real desire to come to agreement . . .'' a determination reached by drawing inferences from assessing the record as a whole. *Chevron Chemical Co*., 261 NLRB 44, 45 (1982), enfd. 701 F.2d 172 (5th Cir. 1983). In reaching a judgment, the Board has sufficient flexibility to examine the content of the bargaining proposals. Id., accord: *Reichhold Chemicals*, 288 NLRB 69, 70 (1988). Notwithstanding the many occasions on which the Board or the courts have attempted to identify succinct standards by which to measure good faith, in the final analysis, its meaning is derived ''only in its application to the particular facts of a particular case.'' *NLRB v. American National Insurance Co*., supra at 410.

2. The Respondents presented predictably unacceptable demands

On evaluating the probative evidence in this case in light of the foregoing principles, I conclude that the Respondents bargained in bad faith by pursuing a predetermined agenda which entailed foisting a host of onerous and predictably unacceptable proposals on the Union at the first bargaining session. Thereafter, while attending 16 bargaining sessions, the Respondents refused to deviate from all but two of their original proposals, demonstrating a rigidity consonant with an intent to frustrate agreement rather than compose differences.

Even before negotiations began, the Respondents charted a course which aimed at provoking an impasse that would coincide with the current contract's expiration date. Their strategy lies at the core of a document titled, ''Contingency Plan 1993,'' but there is little contingent about it.

The Contingency Plan, a remarkable, multipage piece of evidence, admitted as Joint Exhibit 119, discloses the Respondents' strategy and objectives, as well as the steps to be taken to realize those objectives. It reveals that the Respondents prepared their bargaining proposals knowing they would be so unacceptable as to ensure rejection by the Union, leading to an impasse followed by a strike. The Respondents faithfully followed the steps prescribed in the Plan as if it were a map to buried treasure.

The Contingency Plan begins with the following sentence:

> In accordance with the long-range master plan approved by the company concerning human resources at the different operations of. . . (MPR), one of the goals of the upcoming negotiations is to regain management rights. [Jt. Exh. 119 at 1.]

These words indicate that unbeknownst to the Union, another powerful party, the parent Company, was exercising enormous influence over bargaining, having endorsed long-range manpower goals for MPR that entailed, among other things, substantial staff reductions.

Thus, even before the Respondents completed drafting their regressive bargaining proposals, they had defined their goals in the Contingency Plan. They first stressed ''regain(ing) management rights which have been expressly limited by the current Collective Bargaining Agreement to obtain operational flexibility.'' By this, the Respondents apparently meant the right to terminate employees at will without having to account to the Union. They next expressed an intent to reduce ''economic costs, i.e., wages and benefits, in order to become competitive.'' (Jt. Exh. 119 at 1.) Thereafter, the Plan outlined a timetable for negotiations: the meetings would commence in June in order to allow 3 months for bargaining over noneconomic issues, leaving only 6 weeks before the contract expired to address economic proposals.

The following illuminating passage then appears in the Plan:

> *The Union will most likely not accept the changes proposed by the Company and will do its utmost to try to maintain the agreement as is and/or further limit management's operational flexibility. Therefore, there exists a great possibility that at the date of expiration of the contract, October 28, 1993, the union will call a strike at the Catano plant.* [Emphasis added.]

This quoted language plainly discloses the Respondents' game plan. From the outset, the Respondents prepared contract proposals knowing full well that their demands for severe concessions would ensure their rejection. The Respondents' bargaining tactics are not unlike those of the employer in *Herman Sausage Co*., 122 NLRB 608 (1958), enfd. 275 F.2d 229 (5th Cir. 1960), where the Board found evidence of bad faith in the employer's unwillingness ''to accept or consider any contract other than its proposed contract'' which ''constituted such a radical departure from the previous contract in eliminating approximately 26 existing benefits . . . as to be predictably unacceptable to the Union.'' Id. A fortiori, in the instant case, where the Respondents pro-

posed 34 far-reaching concessions which eroded economic gains the Union had obtained over 20 years of bargaining, it is fair to infer that the Respondents knew full well that their proposed contract, taken as a whole, would be predictably unacceptable.

The above-quoted sentences further reveal that the Respondents were not at all interested in striking compromises with the Union during the course of bargaining. If they intended to compose their differences with the Union in order to reach common ground, they could not boldly predict before any bargaining took place, that the Union would strike after the contract expired ''in reaction to the array of 'changes proposed by the Company at their *first* meeting . . . .''' (Emphasis added.) (Jt. Exh. 119.) In other words, the Respondents knew when they formulated their contract demands, that the terms would alienate the Union; yet, made no attempt to modify them. It is fair to infer from their own language that the Respondents were determined that their final offer would be almost as regressive as the first; regressive enough to compel the Union to surrender or strike, with a strike being the anticipated outcome. The Respondents' plan left no room for ''open minds and an intent to find common ground.'' By offering a contract package riddled with harsh concessions, which they knew the Union could not accept, and by holding fast to their demands with an unyielding rigidity on all but two economic issues, as well as many noneconomic ones, the Respondents violated their obligation to bargain in good faith. *K-Mart Corp*., 242 NLRB 855 (1979); *Clear Pine Mouldings*, 238 NLRB 69, 99 (1978).

True to plan, the Respondents held their first bargaining meeting with the Union on June 17 and tendered a complete set of contract proposals. The parties met 12 times over the next 3 months to deal solely with noneconomic matters. Then, with only 6 weeks left before the contract's expiration date, the parties turned to the Respondents' economic proposals which, as outlined above, slashed the employees' current wage levels by more than 33 percent. The Respondents' demands vitiated virtually every economic term in the agreement including the cost of medical coverage, the number of holidays, and the grounds for bonus payments under various circumstances, to name just a few.

To be sure, the Respondents offered a few modifications: specifically, a proposal to include the worker's immediate family in the health plan, but with the additional requirement of a 20-percent copayment; a $6000 bonus for each employee to be paid in monthly $1000 installments; and a wage increase for two categories of skilled workers comprising 30 percent of the work force, which still left the affected employees in these categories far below the rates prescribed in the current contract. The Respondents had little to fear by proposing these compromises, since the Union's resistance was to the totality of an offer which contained an overwhelming number of regressive economic modifications, and did not come close to matching the wage and benefit levels in the former agreement.[25]

[25] The Respondents assert that the $6000 bonus per employee would total $822,000, meaning that they were computing this cost on the basis of a 137-member bargaining unit. However, it is unclear whether the $6000 would be paid to the 40 or more employees whom the Respondents intended to lay off.

The Respondents argue that their insistence on an $11-plus-per-hour wage rate cannot be condemned as ''predictably unacceptable,'' since the Union acquiesced to a lower payrate for the employees of a competitor. This argument raises more questions than answers. The Respondents offered no evidence which might disclose whether the lower wage rate for another group of employees constituted a regression in their current earnings and benefits; they did not indicate how long the Company was in business, nor how long the Union had represented the employees there, the market share which the other company possessed, whether that employer had convincingly demonstrated an inability to pay a higher wage or offered concessions in other aspects of the contract to offset a lower wage rate; or when the competitor's collective-bargaining agreement was recently renegotiated or due to expire. Without such additional information, the Respondents' argument that their wage proposal was not predictably unacceptable because the same Local had accepted a lower rate elsewhere, deserves no weight.

The Respondents complain that the Union is the intractable party in this case. They contend they had no fixed agenda and assured the Union that it had free reign to fashion proposals, as long as they complied with their demand for an $11 wage and benefit package.[26] The Respondents' assurance to the Union can be likened to the parent who hands car keys to an adolescent with the injunction that he may drive anywhere as long as he does not leave home.

It is true that the Union did not propose concessions which would have reduced employee earnings far below their current levels, as the Respondents demanded. However, it did offer a number of compromises each of which reduced the amount of its initial wage rate demand. The Union's resistance to more stringent cuts is understandable in light of the Respondents' effort to jettison every economic benefit the workers had attained, while at the same time refusing to support their conclusary judgment that such dire action was required to inflate their competitive advantage. See *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1235–1236 (1989), enfd. 977 F.2d 141 (4th Cir. 1992).

By resisting compromise, the Respondents were seeking more than economic concessions. Their ultimate purpose was to hire permanent replacements under greatly reduced terms and conditions of employment by creating what would pass as an impasse and compelling the Union to strike. Support for the finding that the Respondents intended from the start to provoke a strike (or if need be, institute a lockout) appears at page 5 of the Contingency Plan where the Respondents estimate that their financial exposure from a 9-month work stoppage would total approximately $2 million. However, the Respondents also projected financial benefits of over $4 million during the work stoppage if permanent replacements worked under the final offer, as compared to a profit of $3,492,459 if the unit workers returned under those terms. Evidently, the Respondents weighed fiscal benefits against burdens before entering into negotiations and concluded that implementing the final offer would produce a greater yield if replacements rather than unit employees were on the payroll. Consequently, the Respondents went through the motions of bargaining, biding their time until the contract ex-

[26] In fact, the few changes which the Respondents made in their offer brought the average weighted wage and benefits rate to $11.59.

pired.[27] When the employees failed to strike, the Respondents quickly turned to their alternative strategy—a lockout—followed by the employment of temporary replacement workers who were paid wages even lower than those contained in the final offer. In this way, the Respondents realized the economic advantages projected in the Contingency Plan.

C. *Additional Evidence of Bad-Faith Bargaining*

The General Counsel contends that the Respondents' conduct beyond the bargaining table furnishes additional proof that they manipulated the bargaining process from start to finish in order to goad the Union into striking so that they could then be replaced. To prove his theory of the case, the General Counsel presented evidence to show that months before bargaining commenced, the Respondents planned and took actions based on their anticipation of a strike. Specifically, the Government alleges that the Respondents implemented security measures at the plant months before the contract expired; and arranged for the arrival of and housing for replacement workers within the plant compound before the final offer was delivered. The testimonial evidence offered by the General Counsel's witnesses in support of this theory, as supplemented by documentary proof, was credible and persuasive.

1. Security arrangements

The Respondents' business records show that pursuant to authorization granted in 1992 by corporate headquarters, and months before collective bargaining commenced, MPR erected a 10-foot high cyclone fence edged with barbed wire around the perimeter of the facility. In September, again pursuant to corporate authority, the Respondents purchased and installed a costly closed circuit tv security system at strategic points around the mill's exterior.

The Respondents contend that efforts to protect the facility began several years prior to 1992, for reasons unrelated to the parties' negotiations. To prove this contention, the Respondents introduced letters from the Puerto Rican Coast Guard written in 1991 and 1992 urging the Company to safeguard the mill's waterfront area from criminal activity.

It is undisputed that the cyclone fence was in place months before the parties met to negotiate. Thus, it would be improper to conclude that the erection of the fence was triggered by or related to the parties' labor negotiations. However, the Respondents fail to explain their haste in having the last lock mounted on the fence gates prior to the close of business on October 27.

Another business record leaves no doubt as to the Respondents' motives for installing a closed circuit tv monitoring system around the mill's perimeter. On a form dated August 5 which was forwarded to headquarters, MPR justified its request for funds to purchase the security system on the following grounds: ''In preparation (sic) for the expiration of our union contract for the Catano plant we must increase security procedures to prevent sabotage and provide safety and security for our people and assets.''[28] The surveillance system was installed in mid-September, approximately a month before the parties contract expired. Respondent's Exhibit 18 provides compelling proof that the Respondents were banking on impasse and a strike.

2. Advance planning to replace unit employees

The Contingency Plan offers telling evidence that MPR management, assuming that a work stoppage would occur, planned to run the mill without interruption with the help of ConAgra employees from the United States, at least until local replacements could be hired. Thus, an appendix to the Plan, titled ''Implementation Timetable,'' calls for ''10 USA Human Resources Crew'' to arrive in Puerto Rico on October 24, with 12 more due on October 30. Id.

Lange acknowledged that he decided to summon the U.S. ConAgra employees to Puerto Rico a few days before the final offer was delivered to the Union. He further stated that a total of 27 stateside ConAgra employees arrived at the MPR site on October 30. Whether Lange was perfectly accurate about these details is less important than the fact that some 5 months after the Contingency Plan was prepared the Respondents were taking the very steps the Plan dictated to keep the mill grinding. In accordance with a detailed plan of action prepared months earlier, the Respondents ensured the arrival of ConAgra employees as replacements for a work force which they knew either would be on strike or locked out. The Respondents were confident enough of this outcome to decide a week in advance to transport 27 U.S. workers to the island and rent prefabricated housing for them for a 6-month period.[29]

Lange attempted to justify a 6-month rental of the housing units by explaining that the rental agency insisted on it. His explanation does not wash. If the Respondents wanted a short-lived rental period, they could have billeted the ConAgra replacements at a modest hotel on a week-to-week basis.

Curiously, the duration of the rental period for the housing units coincides in part with the Contingency Plan's estimate of a 6- to 9-month work stoppage. Similarly, through inad-

[27] The Respondents probably were aware that they could impose a lockout even before declaring impasse. However, as discussed above, the Respondents' real objective was to foment a strike and then implement their final offer which they could not do until they were in a position to claim that an impasse was reached and the employees no longer prevented from striking by virtue of what they believed was the contract's expired no-strike clause.

[28] The Respondents also justified the purchase of a closed circuit tv system by noting, ''Even without the threat of a violent strike, the area surrounding the mill is perilious (sic) and represents a constant threat.'' (R. Exh. 18.) The Respondents produced proof that neighborhood hoodlums posed external threats to the facility since at least 1991. The Respondents do not explain why they responded to these threats with such dispatch as they neared the date on which the contract expired.

[29] In defending against the General Counsel's contention that management officials conspired to foment a strike even before collective bargaining commenced, the Respondents claim in their brief that U.S. replacement employees did not arrive in Puerto Rico until October 30 and that the temporary housing units were not installed until the weekend before the lockout was imposed. The testimony on which the Respondents rely does not entirely support their arguments. Lange indeed testified that some 27 ConAgra employees arrived on the island on October 30; however, he did not indicate one way or the other whether any arrived prior to this date, pursuant to the the timetable set forth in the Contingency Plan. While the housing units may not have been installed before the Respondents declared impasse, the decision to rent them and the rental agreement itself had to have been concluded prior to that time.

vertent comments which Supervisor Jesus De Jesus made to a few employees, the Respondents disclosed a week before the collective-bargaining agreement expired that the final offer would be implemented. Specifically, De Jesus told an employee, Cifredo, one of a group of workers who had volunteered for weekend work, that a forthcoming work stoppage would last 6 months. It is unlikely that De Jesus cited a length of time which matched the same estimate given in the Contingency Plan purely by chance. As a midlevel supervisor, De Jesus surely obtained this information from a higher management source.[30] It is noteworthy that De Jesus also told employees that they would be paid for weekend work at rates consistent with the significantly reduced hourly wage rates prescribed in the final offer.

The Respondents called De Jesus as their witness, putting flagrantly leading questions to him so that he could refute the employees testimony with a one word answer—''no.'' His denials of holding the conversations which the employees imputed to him was so patently contrived as to be wholly unconvincing.[31]

In the final analysis, the conclusion that the Respondents were opposed to any compromise which might foster agreement, is not based on the content of one or another specific provisions in their first or final offer. Rather, it is the totality of their conduct at and away from the bargaining table which compels the conclusion that management approached negotiations with a predetermined strategy to undermine bargaining and scuttle any possibility of reaching agreement. They rigidly adhered to this strategy throughout the negotiations without explaining in a rational or convincing manner why the Union should submit to its offensive terms and conditions of employment. As the Board reasoned in *D.C. Liquor Wholesalers*, supra at 1235:

> We do not suggest that management must forgo bargaining on a wage cut merely because the Union finds it unpalatable; it is an entirely different matter, however, when an employer formulates such a demand specifically to avoid its obligation to bargain in good faith.[32]

The Respondents subsequently attended bargaining sessions in the latter part of November, and in February 1994, under the auspices of a mediator. However, as a matter of law, before good-faith bargaining could resume, the Respondents were required to level the playing field by restoring the status quo ante as it existed before the Respondents introduced new terms and conditions of employment. *Lehigh Portland Cement Co.*, 286 NLRB 1366, 1388–1389 (1987), enfd. 849 F.2d 820 (3d Cir. 1988). Instead, the Respondents persisted in demanding acceptance of a final offer which was intended to prod the Union and retaining temporary replacement workers. The Company's resistance to restoring the status quo warrants the conclusion that they bargained in bad faith not only before, but also subsequent to the unlawful lockout. Consequently, evidence of the parties' collective-bargaining efforts after the Respondents unlawfully declared impasse and imposed an illegal lockout shall not be considered. Id., see also *Allied Products Corp.*, 218 NLRB 1246 (1975), enfd. in part 548 F.2d 644 (6th Cir. 1977).

D. *Respondents Created an Artificial Impasse*

On the evening of October 27, the Respondents declared that the parties had reached impasse, handed the union negotiators copies of the final offer, and gave notice that they would implement it on November 1. See *Shipbuilders v. NLRB*, 320 F.2d 615, 621 (3d Cir. 1963), cert. denied 375 U.S. 984 (1963).

However, there can be no ''legally cognizable impasse . . . if a cause of the deadlock is the failure of one of the parties to bargain in good faith.'' *Shipbuilders v. NLRB*, supra at 621. As detailed above, the Respondents refused to disclose pertinent information, presented demands which were predictably repugnant to the Union and, but for two exceptions, refused to deviate from them in order to prevent accord. Each of these findings contribute to the conclusion that the Respondents bargained in bad faith and thereby precluded a valid impasse. *Bolton Emerson, Inc. v. NLRB*, 899 F.2d 104 (1st Cir. 1960); *Herman Sausage*, supra at 229.

Whether a lawful impasse exists also may depend on whether further discussion would be futile. On October 26, the day before the Respondents delivered their final offer, Figueroa told management of his desire to continue bargaining. Then, less than a day later, Figueroa implored the Respondents to refrain from implementing the offer and resume bargaining on November 1, promising that the Union had new proposals to present. The Respondents summarily declined his invitation. The following day, October 29, the Union forwarded a new proposal to the Respondents in which it further reduced its demands and attached a cover letter stating that it had ''even more flexibility.'' The Respondents did not deign to reject this offer until a month had elapsed. In the interim, the Respondents declined to meet with the Union.

These circumstances bear a strong resemblance to those in *D.C. Liquor Wholesalers*, supra, where the respondents also declared an impasse when the union failed to reduce their bargaining proposals sufficiently. There, too, when a strike failed to materialize, the respondents locked out and replaced their employees, accusing them of inflexibility by insisting

[30] Record testimony suggests but does not prove that De Jesus learned of the Respondents' strategies and timetable from his wife who was Elba Delgado's sister.

[31] To bolster his story, De Jesus pointed out that none of the employees who claimed they spoke to him about working on Saturday, October 29, submitted the required ''Availability of Overtime'' form due the preceding day. This ''evidence'' backfired however, for the Respondents did not allow any unit employee to work after October 27; ergo, no one could have submitted such a form. I have no difficulty in crediting the testimony of the five employees who testified that De Jesus told them their pay rate for weekend work would be lowered to $5.75 per hour, given the forthright manner in which they testified on direct and cross-examination, as well as the consistent and reasonable tenor of their comments.

[32] Since the charts showing a decline from 72- to 60-percent control of market share were prepared prior to the parties' first bargaining session on June 17, they reflected sales data for only the first 6 months of 1993. The Respondents did not provide the Union with any documentation to support the conclusionary figures on the charts, nor did they produce evidence to establish whether during the balance of the year, the market share remained static, declined further, or was recovering at the time the Respondents introduced its final offer, or any time thereafter. Since the Respondents had control over and easy access to such records, they bore the burden of producing them. Their unwillingness to divulge this information to the Union suggests that MPR may have had something to hide.

on retaining current contractual benefits. The Board rejected the respondents' characterization of the union's conduct, stating,

> [Taking into account] the realities of bargaining . . . it [was] not surprising that the Union did not announce a willingness to surrender to lower wages and terms of employment at the beginning of negotiations, or that later . . . merely because [the respondent] said it needed such reductions [i]n the absence of demonstrated need. [Id. at fn. 6.]

In this case, the Union's consistent efforts to return to the bargaining table indicate that further discourse might have been productive if the Respondents had any intention of bargaining with open minds and a commitment to reach an accord. Accordingly, the Respondents' premature declaration of impasse was unlawful. Id. at 1235; *Teamsters Local 639 v. NLRB*, 924 F.2d 1078, 1084 (D.C. Cir. 1991). Management negotiators were legally obliged to consider the Union's new proposals even if they were unlikely to attain agreement. See *Circuit-Wise, Inc*., 309 NLRB 905, 921 (1992). Accordingly, the Respondents' refusal to continue bargaining further violates Section 8(a)(5) and (1) of the Act and together with their failure to supply information, precludes a valid impasse.

To be absolutely clear, the conclusion that the Respondents bargained in bad faith, thereby negating the possibility of a genuine impasse, rests on the following grounds: (1) the Respondents developed a bargaining proposal package which eroded virtually every economic condition in the preceding contract, supplanting them with demands, which in their totality, called for severe and predictably unacceptable concessions; (2) the Respondents refused to budge from their demands in any substantial way, going through the motions of bargaining in order to frustrate agreement and impel the Union to strike; (3) the Respondents withheld information which might have assisted the Union in evaluating the legitimacy of their proposals and assertions; and (4) the Respondents hastily declared impasse while the Union continued to offer compromises and plead for a resumption of negotiations while permitting the employees to return to work. For the foregoing reasons, I conclude that the Respondents bargained in bad faith, violating Section 8(a)(1) and (5) of the Act.

E. *The Respondents Unilaterally Altered Contractual Terms*

It is well settled that a respondent may not rely on an impasse brought about by its own unlawful conduct to justify unilaterally changing terms and conditions of employment. *NLRB v. Katz*, 369 U.S. 736 at 747. The General Counsel argues that the Respondents violated this rule of law by implementing some terms of the final offer; to wit: laying off 40 employees without giving adequate notice to or bargaining with the Union over the layoffs or the employees' entitlement to severance pay; paying the employees by check for their final week of work before the lockout, as permitted by the final offer, rather than in cash, as decreed by the parties' prior labor agreement; terminating the employees' coverage under their former health insurance plan; and failing to distribute Thanksgiving Day turkeys.

The Respondents assert that with the expiration of the parties' collective-bargaining agreement on October 28, they were entitled to implement the final offer, but did not do so, nor did they terminate 40 employees as initially planned.[33] Instead, they maintain that the inception of the lockout forestalled the layoffs.

The Respondents are correct in stating that they did not implement their final offer. The record contains no evidence that any unit employee, no less 40 of them, received a discharge or layoff notice. Neither does the termination of the employees' medical benefits support the General Counsel's argument, since the final offer continued to provide for a health plan, albeit one which was less advantageous than the plan which previously covered the unit employees. Cancelling the workers' coverage under their former health plan was certainly a unilateral change in their terms of employment; it was not, however, a change which brought the employees under the health plan provided by the final offer. Lastly, paying the employees' wages by check rather than in cash on just one occasion is de minimis; it is too weak a reed to support a conclusion that the Respondents implemented the entire final offer.

Although the Respondents did not implement their final offer, this does not mean they could unilaterally change terms and conditions of employment with impunity. In the first place, the parties' collective-bargaining agreement had not yet expired. According to article XXXVI of that agreement, its terms are extended automatically unless one of the parties provides timely notice of ''its desire to modify the Collective Bargaining Agreement . . . 60 days prior to its expiration, or earlier.'' Because the Respondents failed to comply with this critical provision, the contract was automatically extended. Article XXXVI provides:

> Should none of the parties indicate in writing its desire to modify the Collective Bargaining Agreement . . . 60 days prior to its expiration, or earlier . . . the . . . Agreement will continue in effect for . . . 1 additional year . . . if in subsequent years there is no such modification. If on the date of expiration the parties are negotiating . . . or modifying this Collective Bargaining Agreement, the same will be extended indefinitely until such time as a new . . . Agreement is signed. Nevertheless the parties agree that any of the parties may terminate the extended Collective Bargaining Agreement by notifying in writing, return receipt requested or via certified mail to the other party no less than . . . 30 working days prior to such date the date when it wants to terminate the *extended* . . . Agreement. [Emphasis added.]

The Respondents point out that in accordance with article XXXVI of the collective-bargaining agreement, they gave the

[33] The Respondents' decision to eliminate 40 positions was expressly stated in the Contingency Plan. However, they neglected to advise the Union of their intentions until the final day of bargaining and did not provide the precise number of employees to be affected until after they declared that an impasse had been reached. Hence, the Respondents had no intention of bargaining about this matter. Of course, the layoff or dismissal of unit employees is a mandatory subject of bargaining. See, e.g., *Holmes & Narver*, 309 NLRB 146 (1992); *Lapeer Foundry & Machine*, 289 NLRB 952, 954 (1988).

Union express notice by letter dated September 16, that they would not extend the contract's terms. Clearly, the Respondents' September 16 letter did not comport with the duty to give notice of an intent to terminate 60 days prior to the contract's expiration date. Since the parties would have continued to negotiate beyond October 28 but for the Respondents' failure to bargain in good faith and hasty declaration of impasse, it is fair to presume that the contract was ''extended indefinitely'' as contemplated by article XXXVI. The Respondents still could have terminated the extended agreement, but only if they formally notified the Union of their intent to do so after the *extended* agreement took effect on October 29. (Emphasis added.) It goes without saying that the Respondents' September 16 letter could not satisfy this requirement. Consequently, with an extended agreement in effect, unilateral alteration of the terms and conditions of employment of the unit employees and the hiring of replacement workers breached Section 8(a)(1) and (5).

Even assuming that the parties' collective-bargaining agreement had expired, unilateral changes are not permitted before a lawful impasse comes to pass. *Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970). The Respondents staged an impasse by introducing predictably unacceptable first and final offers with an express intent to scuttle the bargaining process. Thus, the Respondents may not rely on that impasse to legitimize its unilateral departure from the terms and conditions of employment embodied in the parties' extended contract.

F. *The Lockout Was Unlawful*

The Respondents contend that the November 1 lockout had two lawful objectives: first, to bring economic pressure to bear on the employees so that they would accede to the final offer and, second, to guard against sabotage to the plant or harm to anyone working there. The Respondents' arguments lack merit.

It is settled law that an employer does not violate Section 8(a)(3) or (5) by imposing a lockout solely to pressure employees to accept its bargaining demands. *American Ship Building*, supra. Conversely, a lockout instituted for proscribed purposes is illegitimate.[34] Whether a lockout falls on one side of the ledger or the other may depend on the employer's intent in a given case. A rule to assess when evidence of intent is required was announced in *American Ship Building v. NLRB*, supra at 289:

> Where the resulting harm to employee rights is . . . comparatively slight and a substantial and legitimate business end is served, the employer's conduct is prima facie lawful. Under these circumstances the finding of an unfair labor practice under Sec. 8(a)(3) requires a showing of improper subjective intent. However, ''where the employer's conduct is demonstrably destructive of employee rights and is not justified by the service of significant business ends, the employer's motivation need not be examined.'' Id. at 282, 283.

It is difficult to conceive of circumstances more harmful to employees' Section 7 rights and less in service of legitimate business interests than those involved in this case. From start to finish, the Respondents duped the Union and its members by appearing to negotiate while insisting on proposals which gutted most of the protections and benefits which their former agreement guaranteed the employees. From the start, their plan was to manipulate the Union and its members into striking by proposing contractual terms that were predictably unacceptable and thereafter, to adhere tenaciously to their proposals.

The Respondents actually were biding time, going through the motions of bargaining until they could declare impasse. By refusing to consider the Union's promises of further concessions, and instead, imposing a lockout while hiring temporary replacements to run the plant, the Respondents violated Section 8(a)(1) and (3). Id.

The Respondents created a situation in which the Union appeared incapable of promoting and protecting its members' interests. In this way, the Respondents actions could gravely damage the employees' support for their collective-bargaining representative. Under other circumstances, the Court of Appeals for the First Circuit described the deleterious impact that an employer's unfair labor practice violations may have on undermining employee support for a union:

> Employee interest in a union can wane quickly as working conditions remain apparently unaffected by the union or collective bargaining. When the company is finally ordered to bargin with the union some years later, the union may find that it represents only a small fraction of the employees.

Asseo v. Pan American Grain Co., 805 F.2d 23, 27 (1st Cir. 1986); see also *American Ship Building v. NLRB*, supra; *Darling & Co.*, 171 NLRB 628 (1968), enfd. sub nom. *Lane v. NLRB*, 418 F.2d 1208 (D.C. Cir. 1969). Since the ''the employer[s]' conduct is demonstrably destructive of employee rights and is not justified by the service of significant business ends,'' the lockout initiated on November 1 is in breach of Section 8(a)(1), (3), and (5) of the Act. *Movers & Warehousemen's Assn. v. NLRB*, supra; *NLRB v. Bagel Bakers Council of Greater New York*, 434 F.2d 884, 888–890 (2d Cir. 1970), cert. denied 402 U.S. 908 (1970).

The Respondents also contend that the lockout was required to protect the plant from sabotage. Of course, an employer may protect property from anticipated damage during a strike without running afoul of the Act. *Link Belt Co.*, 26 NLRB 227 (1940). However, the Respondents failed to adduce convincing proof that the lockout imposed here was prompted by legitimate fear of employee vandalism. What the evidence does show is that the Respondents had decided long in advance that if the unit employees failed to strike, they would impose a lockout for reasons that had little to do with anticipated harm to the plant.

Moreover, the employees could have harmed the mill and anyone working there even while locked out, if they chose to do so. Yet, the Respondents were unable to produce substantial or convincing evidence that the employees were responsible for any acts of sabotage or intimidation. The Respondents alluded to the fact that the Catano plant was in a high crime area, but drug sales, theft, and gunshots were

[34] An employer may have a dual purpose in locking out employees, but the fact that one of those motives is legitimate, does not prevent a finding that the other is unlawful under the Act. See *Movers & Warehousemen's Assn. of D.C. v. NLRB*, 550 F.2d 962 (4th Cir. 1977), cert. denied 434 U.S. 826 (1977).

common occurrences in the area known as ''Little Vietnam,'' long before the current negotiations were underway. Moreover, the Respondents could not link several telephoned bomb threats to any employee; nor did they allege that any temporary replacement worker or management personnel was injured, threatened, or intimidated while employed at MPR.[35] To the contrary, Figueroa complained that truckdrivers entering the facility while negotiations were in progress were engaging in conduct which was potentially dangerous to the employees in the weeks prior to the lockout. In the absence of any proof to support their alleged fear of employee sabotage, the Respondents' rationale for imposing a lockout is based on speculation.

IV. THE RESPONDENTS ARE JOINT EMPLOYERS

In support of the complaint, the General Counsel contends, and the Respondents deny that they are joint employers. To prove that a joint employer relationship exists in this case, the General Counsel bears the burden of proving that the alleged joint employer exercises significant control over such labor matters as hiring, firing, discipline, and supervision. *Chesapeake Foods*, 287 NLRB 405 (1987). However, the right to exercise significant control over labor relations may be sufficient, standing alone, to establish a joint employer nexus. *Cabot Corp*., 223 NLRB 1388 (1978), affd. sub nom. *Chemical Workers Local 483 v. NLRB*, 561 F.2d 253 (D.C. Cir. 1977). I concur with the Government's position, finding more than ample record evidence that MPR, and ConAgra Inc. and/or ConAgra Grain Processing Companies shared responsibility for the labor relations policy applied to and affecting unit employees at the MPR facility.

Compelling proof of the parent Company's influence over MPR labor relations springs from the opening sentence of the Contingency Plan which acknowledges that MPR's bargaining strategy and contract proposals were formulated to fulfill ConAgra's long-range plan for human resources. Further, at the first bargaining meeting, the Union was informed of a major change in corporate structure which meant that henceforth, MPR would be a part of a newly formed Grain Processing Division. Such a reorganization can at the direction of the parent Company. The Union also was advised that its performance would be compared with that of 60 other facilities in that division. Lange's announcement of these matters reveals that the Respondents intended to apply uniform standards in assessing the performance of all 60 plants in its grain processing division, thereby indicating a common or joint approach in measuring the productivity of all employees.

Also note that MPR had to request approval from corporate headquarters before investing funds in capital expenditures. Thus, before installing a closed circuit video security system which Lange justified as an antistriker defense mechanism, he obtained the parent Company's authorization. Further, MPR sought the advice of attorneys who represented the parent Company regarding the rules of the sea so that the flow of goods to MPR would not be interrupted during a strike. Further evidence of coordination between the parent Company and MPR lies in Godbout's attendance at the first and last bargaining sessions at the Catana plant. As vice president for human resources of the Grain Processing Companies, his participation and presentations at these meetings underscore the importance ConAgra attached to the Respondents' unyielding demands for concessions.

ConAgra's dominant position with respect to MPR's labor policy is also revealed by Lange's not-too-veiled threat that the parent Company might close the Puerto Rican plant if it was not more competitive. An employer wields no greater power than when suggesting it may not permit a subsidiary to survive. The foregoing evidence erases any lingering doubt about the control which the ConAgra Grain Processing Companies exercised over MPR's labor relations policy. See *W. W. Grainger*, 286 NLRB 94 (1987).

CONCLUSIONS OF LAW

1. The Respondents are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Since September 18, 1972, The Union has been the exclusive bargaining representative under Section 9(a) of the Act of the following unit which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All of the employer's production and maintenance employees in its Guaynabo, Puerto Rico mills, to include dispatchers, receiving clerks, parts clerks, elevator weight takers, warehouse employees and temporary or casual employees who during the period of January 1, 1972 to June 30, 1972, worked for 120 or more hours per month for at least 5 months during said period and who continued on as temporary or casual employees during the selected eligibility period and as of the date of the election, but excluding all office employees, sales personnel, guards and supervisors as defined by the Act and every temporary or casual employee who is not within the formula specified in the inclusions.

4. By refusing to meet and bargain with the Union in good faith as the exclusive bargaining representative of employees in the above-described unit by refusing to furnish relevant information requested by the Union and proposing predictably unacceptable contract terms and refusing to budge significantly from them to further their own bad-faith bargaining objectives, the Respondents violated Section 8(a)(1) and (5) of the Act.

5. By failing and refusing to promptly provide the Union with all requested information necessary and relevant for collective-bargaining purposes, including the following information relevant to MPR: (a) audited financial statements for the past 5 years, materials reflecting future sales contracts and those of the past 3 years, data comparing MPR's wages and benefits with those of competing mills in Puerto Rico; payroll records of workers currently working at MPR; and (b) for all other plants which compose the ConAgra Grain Processing Companies: collective-bargaining agreements to which the respective plants are party; data pertaining to profit margins and operational costs; records showing ConAgra Grain Processing Companies' market share compared with the mar-

[35] There is a hint in the record that the bomb threat received on October 27 was initiated by management as a ruse to quickly clear the employees out of the mill before they learned that the Respondents had delivered a final offer to the Union that evening.

ket share of their competitors; and collective-bargaining agreements for the past 10 years to which ConAgra Grain Processing Companies are party, the Respondents violated Section 8(a)(1) and (5).

6. By unilaterally changing the terms and conditions of employment of employees in the above-described bargaining unit, including, but not limited to canceling their group health insurance coverage, without first giving the Union proper notice of and an adequate opportunity to bargain to agreement or good-faith impasse about such proposed changes, the Respondents violated Section 8(a)(1) and (5) of the Act.

7. By failing to maintain and abide by the terms of their collective-bargaining agreement with the Union, the Respondents violated Section 8(a)(1) and (5) of the Act.

8. By locking out their employees and depriving them of their wages and benefits and thereafter, hiring temporary replacement workers to further their unlawful bargaining conduct and frustrate the bargaining rights of employees and their Union, the Respondents violated Section 8(a)(1), (3), and (5) of the Act.

9. By promising to release information to the Union on condition that it withdraw an unfair labor practice charge filed with the Board, the Respondents violated Section 8(a)(1) and (5) of the Act.

REMEDY

In light of the foregoing conclusions of law, I shall recommend that the Respondents be ordered to cease and desist from committing the unfair labor practices found above; and restore to the greatest extent possible, the terms and conditions of employment which were in effect prior to the declaration of impasse on October 27. Moreover, I shall recommend that the Respondents furnish the Union with the information identified in paragraph 5 of the Conclusions of Law, and, on request, bargain in good faith with the Union until agreement or impasse is reached. If an agreement is attained, the Respondents shall execute and implement it forthwith.

I also recommend that the Respondents be ordered to take certain affirmative action to remedy the consequences of their unlawful lockout of employees and the unlawful unilateral changes in their terms and conditions of employment, including, but not limited to restoring the unit employees to the positions held prior to the lockout, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, any employees hired in their place. In addition, the unit employees shall be made whole, with interest computed in accordance with current Board standards, for any loss of wages, holidays, personal and vacation days, any expenses incurred to obtain substitute health and pension coverage, and any disbursements made by them for medical expenses that would have been covered by the then-existing medical plan were they not unlawfully locked out, as required in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, I shall recommend that the Respondents contribute to the unit employees' medical and pension plans in amounts sufficient to reinstate each employee-member so that coverage is resumed as of the first day of reinstatement.

[Recommended Order omitted from publication.]